



DAVID HANSON

185 IBLA 186

Decided January 28, 2015



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

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IBLA 2013-96

Decided January 28, 2015

Appeal from a decision of the Oregon State Office, Bureau of Land Management, declaring tunnel sites abandoned and void for failure to file a notice of intent to hold for the 2012 filing year. ORMC 155045, ORMC 155046.

Reversed and remanded; petition for stay denied as moot.

1. Federal Land Policy and Management Act of 1976:
Recordation of Affidavit of Assessment Work or Notice
of Intention to Hold Mining Claims--Mining Claims:
Recordation of Affidavit of Assessment Work or Notice
of Intention to Hold--Mining Claims: Tunnel Sites

The failure to file a notice of intent to hold a tunnel site is a curable defect, and it is incumbent upon BLM to provide a notice of deficiency and reasonable opportunity to cure the deficiency before determining the tunnel site to be abandoned and void.

2. Evidence: Presumptions--Evidence: Burden of Proof--Evidence:
Preponderance of the Evidence

There is a legal presumption that administrative officials have properly discharged their duties and have not lost or misplaced legally significant documents filed with them and, hence, the absence of timely date-stamped documents from the record will support a finding that the documents were not timely filed. The presumption of regularity may be rebutted with probative evidence to the contrary.

APPEARANCES: David Hanson, Tygh Valley, Oregon, *pro se*.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

David Hanson has appealed a decision of the Oregon State Office, Bureau of Land Management (BLM), dated February 22, 2013. In its decision, BLM declared the Hole in the Wall and Wes' Folley a/k/a Play Beats Work tunnel sites (ORMC 155045 and ORMC 155046, respectively) abandoned and void for failure to file a notice of intent (NOI) to hold the claims by December 31, 2012, for the year ending September 1, 2012. BLM issued the decision to David, Steve, Wesley, and Kurtis Hanson, the co-locators of the two tunnel sites. References to Hanson in this order are to David, the appellant.¹ The record does not include the required filing, and Hanson has not shown that it was made. However, the failure to file an NOI to hold a tunnel site is a curable defect. BLM's decision declaring the tunnel sites abandoned and void, without first affording the claimants an opportunity to comply with a notice of deficiency, was error. Accordingly, we reverse and remand to BLM for further action consistent with this order.

Background

In its decision, BLM acknowledged that a maintenance fee waiver certification (Waiver Certification) was filed on August 20, 2012, for the 2012 assessment year. BLM stated, however, that the regulation at 43 C.F.R. § 3835.31 requires persons who file waivers for tunnel sites to also file an NOI every year on or before December 30. BLM further stated that the appellant did not file an NOI on or before December 31, 2012,² and, therefore, that the tunnel sites are considered "abandoned and void."³ Decision at 2 (citing 43 C.F.R. § 3835.91).

Hanson's appeal states in its entirety: "I'm appealing the decision enclosed on the basis that all paperwork was filed on time. Materials mail[ed] are enclosed with cop[ies]. I'm also requesting a stay based on the same material." Hanson included a copy of a note, signed by Hanson, which states: "Enclosed is my letter to keep and work claim # 155045 and 155046 for the new year." Hanson also included a copy of

¹ References to the "Hansons" are to the four named co-locators.

² The due date was extended to Dec. 31, 2012, because December 30 was a Sunday and BLM's office was officially closed.

³ However, the more appropriate terminology for a failure to file under these circumstances is "forfeit" or "forfeited" instead of "abandoned and void." BLM used the phrase "abandoned and void" in its decision, but the applicable regulations use the term "forfeit" or "forfeited" with respect to filing an NOI to hold tunnel sites. See 43 C.F.R. §§ 3830.91, 3830.93, 3830.94(d). Accordingly, we shall generally use the term "forfeit" or "forfeited" herein, except where quotations to the decision or other documents differ.

the Waiver Certification for the tunnel sites that was filed with BLM on August 20, 2012.

Discussion

Under applicable law, the holder of an unpatented mining claim, mill site, or tunnel site, is required to pay a maintenance fee for each claim or site on or before September 1 of each year. 30 U.S.C. § 28f(a) (2006); *see* 43 C.F.R. § 3834.11(a)(2). Payment of the claim maintenance fee is in lieu of the assessment work requirements of the Mining Law of 1872, 30 U.S.C. §§ 28-28e (2006), and the related filing requirements of section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (2006), for the upcoming assessment year. 30 U.S.C. § 28f(a) and (b) (2006); *see* 43 C.F.R. § 3834.11(a).

The statute, however, grants the Secretary of the Interior the discretion to waive the fee payable in any year for a claimant who certifies in writing (Waiver Certification) that, on the date the payment is due, the claimant and all related parties hold not more than 10 mining claims, mill sites, or tunnel sites, or any combination thereof, on public lands and have performed assessment work required under the Mining Law of 1872, for the preceding assessment year.⁴ 30 U.S.C. § 28f(d)(1) (2006); *see* 43 C.F.R. § 3835.11(a); *Frank E. & Carol Sieglitz*, 170 IBLA 286, 290 (2006). The fee waiver is for the upcoming assessment year. The Hansons timely filed a Waiver Certification for the tunnel sites on August 20, 2012, for the upcoming assessment year, September 1, 2012, through September 1, 2013.

In addition to filing a Waiver Certification, a tunnel site claimant is required under 43 C.F.R. § 3835.15(a) to “[m]ake a FLPMA filing, in the form of a notice of intent to hold [the claim] under 43 C.F.R. §§ 3835.31 and 3835.33 . . . on or before December 30th immediately following the submission of a waiver request.” Pursuant to 43 C.F.R. § 3835.31(d)(4), a tunnel site claimant is not required to file an affidavit of assessment work, but must file an NOI to hold the tunnel site. Subsection (a) of § 3835.31 states that the required annual filing must be made on or before the December 30th of the calendar year in which the assessment year ends.

[1] The requirement to file an annual NOI to hold mill sites and tunnel sites is provided by regulation, not by statute. *See* 43 C.F.R. § 3835.31(d)(4).⁵ As such,

⁴ When payment is not waived, failure to pay the claim maintenance fee “shall conclusively constitute a forfeiture of the unpatented mining claim . . . by the claimant and the claim shall be deemed null and void by operation of law.” 30 U.S.C. § 28i (2006); *see* 43 C.F.R. §§ 3830.91(a), 3835.92(a).

⁵ This regulatory requirement “is needed so the Bureau can keep informed as to the status of sites” 44 Fed. Reg. 9720, 9721 (Feb. 14, 1979).

the Hansons' failure to file an NOI to hold the tunnel sites is a curable defect. As discussed below, it was improper for BLM to declare the tunnel site claims abandoned and void without first according them an opportunity to comply with a notice of deficiency. *E.g., Feldslite Corporation of America (Feldslite)*, 56 IBLA 78, 88 I.D. 643 (1981); *see* 43 C.F.R. § 3830.93(b) ("If there is a defect in your compliance with a regulatory, but not statutory, requirement, the defect is curable. You may correct curable defects when BLM give you notice. If you fail to cure the defect within the time BLM allows, you will forfeit your mining claims or sites.").

The Board's seminal case on the subject of the failure to file an NOI as a curable defect is *Feldslite*. Although that case involved a mill site, we have applied its reasoning to tunnel sites as well. *See Ruth Irene Hackathorn*, 94 IBLA 194, 196 (1986); *Heidelberg Silver Mining Co., Inc.*, 58 IBLA 10, 12 (1981); *John R. Erickson*, 57 IBLA 157, 159-60 (1981); *Robert P. Wilson*, 57 IBLA 40, 42-43 (1981).

In *Feldslite*, the Board construed section 314(a) and (b) of FLPMA, 43 U.S.C. § 1744(a) and (b) (2006), with reference to mill sites, and concluded that the statute must be read as only requiring the filing of a notice of location with respect to such sites. 56 IBLA at 81, 88 I.D. at 645. The requirement that a claimant file an NOI to hold a mill site was provided by the Department's regulations. It was undisputed that the claimant did not file an NOI for the year in question. *Id.* The question before the Board concerned the effect of such a failure to file, where the necessity for filing is determined by regulations and not the statute. *Id.*

The Board recognized a difference between the consequences which attend a failure to comply with a statutory recordation requirement and one which is purely regulatory. The Board stated:

[W]e have recognized that a failure to comply timely and scrupulously with the express statutory requirements cannot be waived by the Department. *Lynn Keith*, 53 IBLA 192, 88 I.D. 369 (1981). On the other hand, failure to comply promptly with those requirements based on purely regulatory language is subject to curative action. *See Robert W. Hansen*, 46 IBLA 93 (1980).

Feldslite, 56 IBLA at 82, 88 I.D. at 645.

The Board held that upon the failure of a mill site claimant to file an annual NOI, BLM must provide notice of this deficiency and afford the claimant a period of time in which to comply with the regulatory requirement. *Feldslite*, 56 IBLA at 82-83, 88 I.D. at 646 (citing *Topaz Beryllium v. U.S.*, 649 F.2d 775, 778 (10th Cir. 1981)); *see also Kathryn Firestone*, 148 IBLA 126, 130 (1999). Should compliance not then occur, the mill site is properly declared abandoned and void. *Id.* at 83, 88 I.D. at 646. Accordingly, we reversed and remanded the cases for further action. *Id.*

In *Larry G. Andrus (On Reconsideration)*, 169 IBLA 353, 357-58 (2006), the Board construed 43 C.F.R. § 3835.31(c) (promulgated on October 24, 2003, with corrections on December 23, 2003). In the underlying case, *Andrus*, 166 IBLA 17 (2005), the Board had reversed a BLM decision declaring three unpatented mining claims forfeited because no affidavit of assessment work or NOI was filed on or before December 30, 2004, the year the claims were located. BLM did not dispute the Board's holding that the claimants did not have an obligation to file an affidavit of assessment work during the year of location, but that there is a regulatory requirement, embodied in 43 C.F.R. § 3835.31(c), to file an NOI to hold the claim during the location year. Initially, the Board did not state that the failure to file an NOI was a curable defect under 43 C.F.R. § 3830.93(b).⁶

In granting BLM's petition for reconsideration, the Board acknowledged its error in holding that the claims were forfeited for failure to file the NOI in the absence of an opportunity to cure afforded by BLM. The Board stated: "Nevertheless, 43 C.F.R. [§] 3830.93 expressly allows the curing of a defect in compliance with a requirement that is regulatory only, and the failure to file a notice of intent to hold . . . is such a defect." 169 IBLA at 357. We recognized that the Department has determined by regulation that "[i]f there is a defect in your compliance with a regulatory, but not statutory, requirement, the defect is curable." *Id.* (quoting 43 C.F.R. § 3830.93(b)). We vacated BLM's decision declaring the claims forfeited by operation of law for failure to file an NOI and remanded the case to BLM to provide appellants with a notice of, and an opportunity to cure, the deficiency, as contemplated by 43 C.F.R. § 3830.93(b).⁷ *Andrus (On Reconsideration)*, 169 IBLA at 358.

As in *Feldslite* and *Andrus (On Reconsideration)*, the requirement to file an NOI to hold the tunnel sites in the present case, being a regulatory rather than statutory requirement, was a curable defect. It was error for BLM to declare the claims

⁶ This regulation provides: "If there is a defect in your compliance with a regulatory, but not statutory, requirement, the defect is curable. You may correct curable defects when BLM gives you notice. If you fail to cure the defect within the time BLM allows, you will forfeit your mining claims or sites."

⁷ *Contrast* 43 C.F.R. § 3830.93(a): "If there is a defect in your compliance with a statutory requirement, the defect is incurable if the statute does not give the Secretary authority to permit exceptions (see §§ 3830.91 and 3833.91 of this chapter)."

abandoned and void without first providing the Hansons notice and an opportunity to cure the deficiency.⁸

Appellant asserts that “all paperwork was filed on time.” The NOI to hold the tunnel sites for the year ending September 1, 2012, was due to be filed by December 30, 2012. See 43 C.F.R. § 3835.31(a). The term “filed” means that a document is either (a) received by BLM on or before the due date, or (b) postmarked or otherwise clearly identified as sent on or before the due date by a bona fide mail delivery service, and received by the appropriate BLM state office within 15 calendar days after the due date (or the next business day after the 15th day). 43 C.F.R. § 3830.5.

[2] “There is a legal presumption that administrative officials have properly discharged their duties and have not lost or misplaced legally significant documents filed with them and, hence, the absence of timely date-stamped documents from the record will support a finding that the documents were not timely filed.” *Christopher L. Mullikin*, 180 IBLA 60, 68 (2010) (citing, *inter alia*, *William v. Hodel*, 758 F.2d 1369, 1372 (10th Cir. 1985)). “However, this presumption of regularity may be rebutted by probative evidence to the contrary . . . by a preponderance of the evidence.” *Id.* at 68-69 (citations omitted).

The administrative record submitted by BLM does not contain an NOI filed for 2012. Therefore, it is appellant’s burden to show such a document was in fact properly filed with BLM. In support of his appeal, Hanson submitted copies of (1) a Waiver Certification bearing a BLM mail room receipt date of August 20, 2012, and (2) a letter that said “Enclosed is my letter to keep and work claim # 155045 and 155046 for the new year.” This “keep and work” letter bears a handwritten date of “8-15-2013.” Presumably, Hanson meant to date the Letter as “8-15-2012,” since he filed his appeal on March 12, 2013. The letter to “keep and work” the tunnel sites does not bear a BLM mail receipt date. If the “keep and work” letter is intended to refer to another separate letter, it is not included in the record, and Hanson has not

⁸ In the decision on appeal, BLM cited 43 C.F.R. § 3835.91, titled, “What if I fail to file annual FLPMA documents,” which provides: “If you fail to file an annual FLPMA document by December 30, as required in § 3835.31(d), you forfeit the affected mining claims or sites.” However, § 3835.31(d) provides for a variety of annual filings, including filings required by a statute, FLPMA, and other filings not required by FLPMA but by regulation, such as the requirement for NOIs for mill and tunnel sites, in § 835.31(d)(4), and the requirement to file an NOI to hold in the year of claim location, in § 3835.31(d)(8), discussed in *Andrus (On Reconsideration)*, 169 IBLA at 356 n.5, 357 n.6 (quoting 43 C.F.R. § 3830.5).

provided evidence that it was filed with BLM.⁹ We conclude that Hanson has failed to show by a preponderance of the evidence that an NOI was filed for the 2012.

Conclusion

The Hansons' failure to file a NOI to hold the subject tunnel sites is not required by statute, but by regulation, and is a curable defect. BLM should have sent the Hansons a notice of deficiency, providing a reasonable opportunity to cure the defect. *See* 43 C.F.R. §§ 3830.93(b), 3830.94. We therefore reverse the decision on appeal and remand the case to BLM for further action consistent with this order.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed and the case is remanded for further action. Appellant's petition for stay is denied as moot.

_____/s/
James F. Roberts
Administrative Judge

I concur:

_____/s/
Eileen Jones
Chief Administrative Judge

⁹ Notably, the record indicates that notices of intent to hold appear to have been filed for 2011 and 2010, as there is a record of receipt for payment of the notice of intent to hold fees for those years. *See* Receipts dated 8/09/2011 (described as "2011 NOI") and 10/12/2010 (described as "2010 NOI"). However, the record contains no receipt for a 2012 notice of intent.